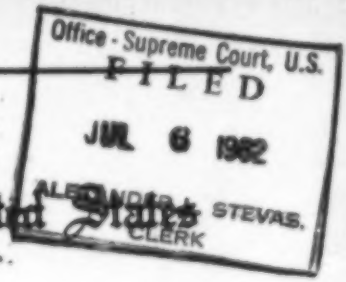
82-9 No.



In The

Supreme Court of the United States

October Term, 1982

RAFAEL SAADON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Was the conduct of the government in this case so shocking as to violate the due process clause of the Fifth Amendment to the United States Constitution?

2. Did the government's over-involvement in this case, which included engaging in conduct which jeopardized the very lives of the persons whom it was investigating, reach such proportions as to bar conviction of this defendant, despite proof of his disposition to commit the crimes charged, as a matter of due process?

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INTRODUCTORY STATEMENT

RAFAEL SAADON, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit made final in this case on June 4, 1982. The parties to the judgment of the United States Court of Appeals were Rafael Saadon, Gabriel Outmezguine and Rafael Ben-Natan as Defendants-Appellants and the United States of America as Appellee.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit, which was rendered on June 4, 1982, was a summary opinion and order, which will not be published. A copy of the opinion of the Court is annexed hereto as Appendix

"A", infra.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit (Appendix "A", infra) was entered on June 4, 1982. Re-hearing was not sought. The jurisdiction of this Court is evoked under 28 U.S.C. §1254 (a). The basis for federal juisdiction in the United States District Court, Eastern District of New York, which was the court of first instance in this case, was that the petitioner and his co-defendants were charged with violation of the United States narcotics laws.

STATEMENT

Petitioner, Rafael Saadon, and his co-de-

fendants were charged and convicted in the United States District Court for the Eastern District of New York of the crimes of conspiracy to violate the narcotics laws and distribution of controlled substances.

The government used a paid informant, Marcel Atties, to gather evidence about and prove this conspiracy. Atties made initial contact with the co-defendant Outmezquine, and met with him for the first time on February 9, 1981. At that meeting, Atties sought to obtain heroin from Outmezguine and, at the same time, broached the idea that he and Outmezguine import 5-7 kilos of heroin from France.

This suggestion was made pursuant to a plan of the government to employ the tactic of a "reverse". A reverse means that the government

agents pose as sellers of drugs in an attempt to discover and seize money earmarked for narcotics purchases.

After the inital contact between Outmezguine and Atties, a heroin transaction was consummated. It was claimed that petitioner, Rafael Saadon, was the person who brought the drugs to the scene of the transaction. Thereafter, two additional drug sales took place, in which Saadon participated and Saadon also participated in discussions with respect to the importation of the heroin from France.

Atties knew that both Saadon and Outmezguine were addicted to heroin. In spite of this knowledge, during the negotiations for the importation of the heroin from France, Atties obtained from the Drug Enforcement Administration

a quantity of pure, undiluted heroin, which was supposed to be a sample of the shipment from France. With full knowledge of the defendants' addiction to this substance, Atties gave this pure heroin to these defendants, who immediately ingested it by snorting it. Atties acknowledged that he was not at all surprised when the defendants ingested this heroin in his presence.

It was established at trial that the ingestion of this pure heroin was clearly dangerous and potentially fatal to the defendants. Indeed, had the defendants injected the heroin rather than snorting it, the testimony from Drug Enforcement Agency Agent Ward established that they probably would have died.

When the testimony at trial revealed the above-recited facts, a motion was made seeking

dismissal of the indictment on the grounds that the conduct of the government had violated due process.

The government attempted to justify its conduct on the ground that if it had not provided a sample to these defendants, it never would have discovered where the money which was to be used for the purchase of the shipment of heroin was kept. Thus, even though the government had obtained evidence that these defendants supplied heroin to the confidential informant in the past, it felt that, irrespective of the risk to these defendants, there was a legitimate governmental purpose in supplying heroin to heroin addicts, since it would allow the government to seize their money.

The motion to dismiss was denied, and on

appeal, the United States Court of Appeals for the Second Circuit affirmed the judgment, holding:

> "Appellant Saadon also argues that the government's conduct in this case was so shocking as to violate the due process clause of the Fifth Amendment in that the government agent supplied Saadon with 2 grams of heroin which was from 89-91% pure, knowing that he was a heroin addict, likely to ingest it, thus risking Saadon's life. This claim is without merit. Supplying heroin samples during a narcotics investigation can hardly be labelled "egregious." Cf. United States v. Alexandro, #81-1435, Slip op. at 1718 (2d Cir., March 18, 1982). The purity of the heroin was essential since it was supposed to be a sample of the uncut heroin coming in from France."
>
> Appendix "A" at 3a-4a.

REASONS FOR GRANTING THE WRIT

This case presents for decision by this

Court the question of whether the government may, in seeking evidence against a potential defendant, engage in conduct which creates a great risk that the defendant will be harmed or killed. The facts are simple: Saadon was a heroin addict who was presented by the government with an opportunity to import substantial quantities of heroin into this country. Although the government, through use of its informant, had already gathered evidence that the defendant was engaged in the distribution of small quantities of heroin, the government decided that it was necessary to provide him with a quantity of pure heroin in an attempt to seize money that had been accumulated by the petitioner to pay for the shipment.

Petitioner claims that this conduct violated due process because of the danger to him,

and, as a result, the government is precluded from seeking a conviction against him based on evidence obtained by this conduct. This argument is predicated upon the species of the entrapment defense which is measured by an objective test, rather than the subjective test which focuses on the predisposition of the defendant to commit the crime.

This type of "entrapment defense" was first discussed by this Court in the case of United States v. Russell, 411 U.S. 423 (1973). On the facts before the Court in that case, it was held that the conduct of the agents was not so shocking as to constitute a violation of fundamental fairness, but the Court stated:

> "We may someday be presented with a situation in which the conduct of law enforcement agents is

> so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction. See, Rochin v. California, 342 U.S. 165 (1952)."
>
> United States v. Russell, supra, 411 U.S. at 432.

In the case of Hampton v. United States, 452 U.S. 484 (1976), the plurality opinion held that the Court had not intended, in Russell, to provide a defense which would give the federal judiciary a veto power over law enforcement practices of which it did not approve. Two justices, however, although agreeing with the conclusion reached by the plurality, did not join in the aspect of the opinion which foreclosed any claim that governmental activities

would not, under any circumstances, amount to a due process violation.

The concurring opinion, written by Justice Powell, in which Justice Blackmun joined, left open the possibility that police "over-involvement" in criminal activity might, under some circumstances, reach such proportions as to bar conviction of a pre-disposed defendant under the principles of due process.

By this petition, we ask that this Court recognize the defense based upon governmental misconduct and hold that on these facts, such misconduct precludes the conviction of the petitioner.

Although this Court and other federal courts have previously held that government

agents may provide controlled substances during the course of narcotics investigations, this case presents additional facts which are crucial and which compell the conclusion that the government has gone too far. In this case, the heroin was absolutely pure; was provided to persons known by the government to be heroin addicts; was given to them by a government informant who was certainly aware of the likelihood that it would be ingested by these defendants; and the heroin was, in fact, ingested by the defendants* The record established that the only reason that defendants were in any condition to stand trial

* The government argued in the United States Court of Appeals for the Second Circuit that although the government's informant knew that the defendants were heroin addicts, the government itself should not be charged with that knowledge. This argument was resoundingly rejected by this Court in the case of United States v. Sherman, 200 F.2d 194 (1952), and during oral argument, th judges indicated that they were deciding the case on the assumption the the government did, in fact, have knowledge of the fact that the defendants were heroin addicts.

on these charges was that they ingested the heroin by snorting it rather than by injecting it.

The judges of the Court of Appeals recognized that the conduct of the government herein was dangerous to the defendants and, during oral argument, counsel was asked whether or not our only objection to this procedure was in the fact that it was dangerous. We replied in the affirmative. In affirming the judgment, the Court below obviously believed that so long as the government could point to a legitimate governmental purpose in engaging in such conduct, the danger to the defendants was immaterial.

This attitude, and the conduct complained of herein, cannot be condoned. The Fifth Amendment to the Constitution of the United States

protects, and guarantees, the right of persons to life, liberty and the pursuit of happiness. It has never before been held, and could not, under the principles of due process, be held, that the government, in order to obtain evidence against a defendant, was privileged to engage in conduct dangerous, and potentially fatal to, that person.

The question of whether governmental conduct violates due process has previously been considered by this Court in the context of whether that conduct was "shocking to the conscience" of the Court. It is submitted that it is truly and fundamentally shocking that the federal government would show such reckless disregard for the lives and safety of suspects that it would hand a potentially fatal dose of heroin to a heroin addict. As nefarious as drug

trafficking is, there is no justification for the government's stooping to these levels in order that its investigation might continue.

When this Court previously held that the government can engage in illegal activities, it presumably envisioned a method of control which would insure that drugs distributed by the government would not be consumed, particularly where the sample provided was a potentially fatal dosage. Although the Assistant United States Attorney argued that the distribution of heroin in this case was regulated by tight procedures, those "safeguards" apparently did not take into consideration the fact that the distributees were addicted to the substance provided, and were, therefore, likely to ingest it. In this respect, the government's safeguards are clearly deficient.

The Court of Appeals for the Second Circuit was wrong in holding that the investigative methods employed in this case were justified and proper. Governmental misconduct which is dangerous to the lives of people is abhorrent and must be condemned. As a result, we ask that this Court accept jurisdiction of this case, and address the issue of whether the government is free, with impunity and without judicial sanction to endanger the lives of persons whom it is investigating.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the United States Court of Appeals for the Second Circuit to review the judgment of that Court.

For the foregoing reasons, a writ of certiorari should issue to the United States Court of Appeals for the Second Circuit to review the judgment of that Court.

Dated: June , 1982
New York, New York

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of June, one thousand nine hundred and eighty-two.

Present:

HONORABLE IRVING R. KAUFMAN,

HONORABLE RALPH K. WINTER,

Circuit Judges,

HONORABLE ROBERT J. WARD,

District Judge, sitting by designation

UNITED STATES OF AMERICA,

Appellee,

v.

81-1476
81-1480
81-1482

GABRIEL OUTMEZGIUNE, RAFAEL SAADON, and RAFAEL BEN-NATAN,

Appellants.

Appendix A

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

1. Appellants Rafael Saadon and Gabriel Outmezgiune claim that Judge Bramwell erred in refusing to give the entrapment charge requested. In this Circuit, if the defendant adduces some evidence of inducement by the Government, the prosecution then has the burden of establishing the defendant's propensity to commit the crime *United States v. Valencia*, 645 F. 2d 1158, 1166 (2d Cir. 1980); *United States v. Sherman*, 200 F. 2d 880, 882-83 (2d Cir. 1952). Assuming that Saadon and Outmezgiune met their burden, the entrapment charge was not necessary "if uncontradicted proof has established that the accused was 'ready and willing without persuasion' and to have been 'awaiting any propitious opportunity to commit the offense.' " *United States v. Riley*, 363 F. 2d 955, 959 (2d Cir. 1966). The propensity of Saadon and Outmezgiune to commit the crimes was established overwhelmingly. They instantly accepted the suggestion that they purchase the heroin from France. They were able to deliver heroin to the Drug Enforcement

Administration (DEA) informant Marcel Atties on the very day he asked for it. They possessed large amounts of cash which indicated that they were substantial and frequent drug traffickers. Saadon and Outmezgiune adduced nothing to contradict this evidence of propensity. Accordingly, under the circumstances, it was not erroneous for the trial judge to refuse to charge the jury on entrapment. *United States v. Licursi,* 525 F. 2d 1164, 1168-69 (2d Cir. 1975).

2. Appellant Saadon contends that Judge Bramwell improperly refused to charge the jury that "the fact that a person may have been in a state of drug-induced stupor at the time of the commission of a crime may negative the existence of specific intent." There was simply no evidence, however, indicating that Saadon's drug addition [sic] led him to be so consistently under the influence of drugs that he was unable to form the mental intent necessary to commit the crimes charged. *See United States v. Busic,* 592 F. 2d 13, 21 (2d Cir. 1978).

3. Appellant Saadon also argues that the Government's conduct in this case was so shocking as to violate the Due Process Clause of the Fifth Amendment in that the Government agents supplied Saadon with 2 grams of heroin which was from 89%—91% pure knowing that he was a heroin addict likely to ingest it thus risking Saadon's life. This claim is without merit. Supplying heroin samples during a narcotics

investigation can hardly be labelled "egregious". *Cf. United States v. Alexandro,* No. 81-1435, slip op. at 1718 (2d Cir. Mar. 18, 1982). The purity of the heroin was essential since it was supposed to be a sample of the uncut heroin coming in from France.

4. There was ample evidence to support the conviction of appellant Rafael Ben-Natan. The standard on review is whether " 'upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt.' " *United States v. Rivera,* 513 F. 2d 519, 529 (2d Cir.), *cert. denied,* 423 U.S. 948 (1975). Ben-Natan was frequently sighted by DEA agents in or near Saadon's car while Saadon was meeting with Atties and discussing the importation of heroin from France. He participated in a meeting on May 13, 1981 with Saadon, Atties and Outmezgiune and warned them to be careful of possible surveillance. In addition, one of the safety deposit boxes containing the money to be used for the purchase which was shown by Saadon to Atties belonged to Ben-Natan and he held a power of attorney over another box. The evidence sufficiently demonstrated that Ben-Natan was a knowing participant of the conspiracy.

5. Appellants' other claims are equally without merit.

6. Accordingly, the judgments are affirmed.

Appendix A

s/ Irving R. Kaufman
IRVING R. KAUFMAN,

s/ Ralph K. Winter
RALPH K. WINTER,
Circuit Judges.

s/ Robert J. Ward
ROBERT J. WARD,
District Judge.